

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**CM(M) 265/2022
CM(1655/2023) CM(2036/2023)
CM(2785/2023) CM(6382/2022) CM(6652/2022)
c/w CCP(S) 78/2023**

NIKHAT NABI

... Petitioner/Appellant(s)

Through: Ms. Rifat Ara Butt, Advocate

V/s

M/S FANCY FABRICS AND OTHERS (J AND K BANK LIMITED)

Through: Mr. Altaf Haqani, Sr. Adv. with Mr. Shakir Haqani, Adv. for R2-3
Mr. Shafqat Nazir, Advocate for R13

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
22-09-2023

Oral

1. Respondents 1-11 have been set *ex parte* in terms of order dated 26.4.2023.
2. The record of the proceedings reveals that on 24.7.2023 a Coordinate Bench of this court has directed listing of the main petition along with connected applications for consideration after observing that that instead of passing interim orders on the applications in the case, the main petition itself should be heard finally.
3. Learned counsel for the petitioner, however, would insist that the order passed on 21.2.2023 by this court is not being complied with, whereunder respondent 13 came to be directed to deposit an amount of Rs.10/- lakhs before the Registrar Judicial of this court within two

weeks' time and in the event it was deposited, the Registrar Judicial had to deposit the same in a fixed deposit in initially for a period of six months. Perusal of the order dated 21.2.2023 passed by this court also required the Registrar Judicial to have the record of the suit titled as "JK Bank vs. Fancy Fabrics" claimed to have been disposed of by the court of Principal District Judge, Srinagar, upon a compromise on 3.6.2006, and ensure its production before this court, and in the event the said record is found to be missing as is alleged by the petitioner, necessary action as warranted under law be initiated.

Learned counsel for the petitioner would contend that the said order has not been complied with. On the contrary, counsel for respondent 13 states that an application for vacation of the said order has been filed, being CM no. 1655/2023, to which objections are stated to have been filed by the counsel for the petitioner.

4. Perusal of the record would reveal that the Registry has made a report on 31.3.2023 stating therein that though in terms of order passed by this court, the record of the suit was summoned from the District Court, Srinagar, however, same, appears to have got affected by the floods of 2014 and although efforts were made to get the record copied but same could not be scanned/copied owing to the inability expressed by the concerned sections of the High Court. Perusal of the record would reveal that the Registry has also made a report on 6.4.2023 stating therein that copy of the original suit filed by the J&K Bank through M/s Zaffar Law Associates has become available and is attached with the file.

5. **Be that as it may**, in view of order dated 24.7.2023 supra, the main matter is taken up for consideration.
6. In the instant petition supervisory jurisdiction of this court enshrined under Article 227 of the Constitution is being invoked by the petitioner herein for seeking quashment of order dated 14.9.2022 (for short the impugned order) passed by the court of Principal District Judge, Srinagar, (for short the trial court) in case titled as “The Jammu and Kashmir Bank Ltd. vs. M/s Fancy Fabrics and others.

The facts emerging from the record would reveal that the respondents 2 and 3 herein were running a wholesale and retail business of cloth, textiles, readymade garments, fabrics, etc. at the business place namely “M/s Fancy Fabrics and M/s Saman Sagar Collection at Budshah Chowk, Srinagar” as proprietors and in furtherance of the said business had applied for loan from J&K Bank Limited, New Secretariat Road, Srinagar, respondent 13 herein, against primary security of hypothecation of stocks of all kinds as also against the collateral security of mortgage and other immovable properties owned by the said respondents 2 and 3, besides availing loan from various private individuals including the present petitioner.

7. The petitioner herein claims to have also provided a loan of Rs.3 lakhs to the respondent 2 and 3 in the month of February 2002 at the rate of 3% interest per month and in lieu thereof, the said respondents are stated to have executed a promissory note as also a declaration providing therein that in case the said respondents fail to repay the amount of loan availed from the private respondents reflected in the

said declaration including the petitioner herein, the said creditors would have a charge on all their immovable properties including the business concern namely Fancy Fabrics.

8. The respondents 2 and 3 are stated to have defaulted in repayment of loan to the J&K Bank resulting into institution of a suit for recovery of the said loan amount by the Bank against respondents 2 and 3 on 21.6.2003 before the trial court as also against the mortgage mortgagors/guarantors. The said suit came to be decreed on a compromise between the plaintiff bank as also the defendants resulting into passing of a compromise decree and judgment dated 3.6.2006. The said judgment and decree, however, was not complied with by the defendants judgment debtors in the suit resulting into filing of an execution petition before the trial court by the plaintiff bank on 16.6.2017 which after contest came to be settled and disposed of on 30.10.2019 and consequently the judgment and decree came to be satisfied.
9. The present petitioner having come to know about the satisfaction of the judgment and decree and for protection and enforcement of her rights qua the amount of loan claimed to have an advanced by her to the respondents 2 and 3 herein, filed multiple applications before the trial court including a time-barred application for setting aside the judgment and decree dated 3.6.2006 and after allowing the application seeking condonation of the delay, the trial court dismissed the application seeking setting aside judgment and decree in terms of the impugned order.

10. The impugned order is assailed on the grounds urged in the petition.

Heard learned counsel for the parties and perused at the record.

11. Having regard to the nature of controversy involved in the petition, the fundamental issue arising for consideration of this court would be as to whether the petitioner herein could seek the setting aside of the compromise judgment and decree dated 3.6.2006 by filing an application without being party to the suit on the ground that the petitioner had a charge/lien over the property and the stocks hypothecated by the respondents 2 and 3 herein which property and stocks were hypothecated for the respondent 13 Bank, on the ground that the petitioner had provided a loan amount of Rs.3/- lakhs to the respondents 2 and 3.

12. Before proceeding to address to the aforesaid issue, it would be appropriate to refer to the following provisions of Civil Procedure Code being relevant herein:

Order 23 Rule 3 CPC

3. **Compromise of suit.**—Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise 1[in writing and signed by the parties] or where the defendant satisfied the plaintiff in respect to the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith 2[so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:]

[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but not adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

[Explanation.— An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]

13. A bare perusal of the provisions of Order 23 Rule (3) Clause (A) signifies that where the court is satisfied that the suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and pass a decree in accordance therewith. The provision further provides that where one party alleges adjustment or settlement of the suit and other party denies it, the court is bound to decide the question. Like Order 23 Rule (1), the underlying object of Order 23 Rule 3 also is to permit the parties to settle the disputes, and recognises, respects and encourages the parties to the suit to settle and compromise the lis between the parties. The provisions of Order 23 Rule (3) have been held to be mandatory in nature by the Apex Court in case titled as **“Silver Screen Enterprises versus Devki Nandan Nagpal reported in (1970) 3 SCC 878”** wherein it has held that once a dispute is validly settled by the parties out of the court and the court is asked to pass a decree in terms of compromise, the court has no discretion in the matter and has no power to refuse the prayer on the ground that it considers the compromise too favourable to one of the parties.

A reference hereunder to the provisions of Order 23 Rule (3) Clause (A) being relevant and germane herein becomes imperative, which reads as under:

[3A. Bar to suit.—No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.]

14. The ambit and scope of Order 23 Rule (3-A) came to be deliberated upon by the Apex Court in case titled as **R. Janakiammal v. S. K. Kumarasamy reported in (2021) 9 SCC 114** wherein at paras 42, 43, 44 and 58 following has been held:

42. Reading Rule 3 with Proviso and Explanation, it is clear that an agreement or compromise, which is void or voidable, cannot be recorded by the Courts and even if it is recorded the Court on challenge of such recording can decide the question. The Explanation refers to Indian Contract Act. The Indian Contract Act provides as to which contracts are void or voidable. Section 10 of the Indian Contract Act provides that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Section 14 defines free consent in following words:

"14. "Free consent" defined.-Consent is said to be free when it is not caused by-

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake."

43. A consent when it is caused due to coercion, undue influence, fraud, misrepresentation or mistake is not free consent and such agreement shall not be contract if free consent is wanting. Sections 15, 16, 17 and 18 define coercion, undue influence, fraud and misrepresentation. Section 19 deals with voidability of agreements without free consent. Section 19 is to the following effect:

" 19. Voidability of agreements without free consent.-When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.-If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.-A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

44. A conjoint reading of Sections 10, 13 and 14 indicates that when consent is obtained by coercion, undue influence, fraud, misrepresentation or mistake, such consent is not free consent and the contract becomes voidable at the option of the party whose consent was caused due to coercion, fraud or

misrepresentation. An agreement, which is void or voidable under the Indian Contract Act, shall not be deemed to be lawful as is provided by Explanation to Rule 3 of Order XXIII.

58. Learned counsel for the appellants contends that even if consent decree dated 06.08.1984 could not have been challenged, the appellants were entitled for shares in residential building at Tatabad, Dr. Alagappa Chettiar Road, Coimbatore, which was left out from the decree dated 06.08.1984. The above residential suit property was not a part in O.S. No.37 of 1984 and was not in compromise decree dated 06.08.1984. The averment of the appellant is that the said residential property was although in the name of defendant No.1 but it was acquired from joint family funds hence the appellant had also share in the property."

The position of law thus emerging from the aforesaid judgment of the Apex Court is that Order 23 Rule (3A) came to be introduced in the Code to give finality to litigation and to avoid multiplicity of suits by putting a bar on new suit on the ground that agreement on which a compromise decree was passed was not lawful. The language of Order 23 Rule (3A) by its very nature is wide enough to take within its sweep all cases of compromise not being lawful, covering even a case where a party sets a case of want of authority or excess of authority in entering into compromise.

On a close reading of the provision of Order 23 Rule 3(A) what emerges is that bar to sue is limited and applicable only to parties to the compromise and not to third party, stranger, or to those who have not signed the consent terms and it has been held by the Apex Court in case titled as **Banwari Lal vs. Smt. Chando Devi reported in (1993) 1 SCC 581** that a stranger to the compromise is not precluded from filing a suit and the provisions of Order 23 Rule (3A) would not operate against such stranger.

15. Keeping in mind the aforesaid provisions of law and reverting back to the case in hand, it is an admitted fact that the petitioner herein was not

a party to the lis/suit filed by respondent 13 bank against the respondent 3 herein for recovery of the loan amount availed by the said respondent from the bank. It is also an admitted fact that the suit came to be settled upon a compromise between the plaintiff bank and the defendant respondents 2 and 3 herein. It is also not in dispute that the execution proceedings filed by the Bank respondent 13 herein for execution of the said compromise decree and judgment ultimately resulted into satisfaction of the compromise decree and judgment on 30.10.2019.

16. Risking repetition, it is settled position of law as has been noticed in the preceding paras that filing of a fresh suit against a compromise decree and judgment bars the parties to the suit, however a stranger to the suit/lis is well within his/her rights to file independent suit against the compromise judgment and decree. The petitioner herein, however, in the instant case has taken recourse to a remedy not available under law to her while seeking setting aside of the compromise judgment and decree, and the petitioner yet again instead of taking recourse to the appropriate remedy available to her against the compromise judgment and decree has chosen a wrong remedy while invoking supervisory jurisdiction of this court against the impugned order, in that, the supervisory jurisdiction of this court is regulated and governed by the judgment of the Apex Court passed in **Shalini Shayam Shetty and another versus Rajendra Shankar Pati, reported in (2010) 8 SCC 329** whereunder the said jurisdiction is not warranted to be exercised in the case in hand.

17. Viewed thus, what has been observed, considered and analyzed hereinabove, the impugned order does not call for any interference and the exercise of supervisory jurisdiction in the matter is declined. Resultantly, the petition fails and is dismissed. In view of the dismissal of the petition the ancillary applications shall also stand disposed of. The contempt petition arising out of the interim order dated 21.2.2023 passed during the course of the proceedings of the instant petition, shall also stand closed.

(JAVED IQBAL WANI)
JUDGE

Srinagar
22-09-2023
N Ahmad

Whether the order is reportable: Yes

